# APPENDIX

## Opinion of the Supreme Court of the State of Kansas

No. 44,583

THE STATE OF KANSAS,
*Plaintiff-Appellee,*

—v.—

LEROY GARBER,
*Defendant-Appellant.*

## SYLLABUS BY THE COURT

1. A system of education which consists essentially of home instruction does not satisfy the requirements of our compulsory school attendance law (K.S.A. 1965 Supp. 72-4801).

2. The legislature has made no provision for the giving of instruction equivalent to that given in a public, private, denominational or parochial school as a basis for exemption from the provisions of the compulsory school attendance law. The only exemption now enumerated in that law is based on physical or mental disability of the child, and, in view of the legislative history of the statute, this is deemed exhaustive of such exemptions.

3. K. S. A. 72-1106 defining the school month is a statute of general application and is to be considered in connection

with the compulsory school attendance law in determining the requisite period of attendance.

4. The natural rights of a parent are subordinate to the police power of the state and may be restricted by municipal law providing minimum educational standards.

5. Our compulsory school attendance law (K. S. A. 1965 Supp. 72-4801) is a valid exercise of the police power.

6. Religious liberty includes the absolute right to believe but only a limited right to act.

7. The individual cannot be permitted upon religious grounds to be the judge of his duty to obey laws enacted in the public interest.

8. The record of trial in a criminal prosecution brought against defendant for violation of the compulsory school attendance law (K. S. A. 1965 Supp. 72-4801), examined and *held*, (1) the agreed statement of facts in the case support the finding of guilt made by the trial court, and (2) as applied to defendant and his daughter, members of the Old Order Amish Mennonite Church, such law does not infringe upon religious freedom guaranteed by the state and federal constitutions.

Appeal from Reno district court, division No. 2; JAMES H. REXROAD, judge. Opinion filed November 5, 1966. Affirmed.

*E. Dexter Galloway*, of Hutchinson, argued the cause and was on the brief for the appellant.

*Richard J. Rome*, county attorney, argued the cause, and *Raymond F. Berkley* and *Lane H. Cronhardt*, assistant county attorneys, were with him on the brief for the appellee.

The opinion of the court was delivered by

HARMAN, C.J.: This appeal involves the construction and constitutionality of our compulsory school attendance law as applied to the Amish people.

The action as commenced in the district court of Reno County, Kansas, by the filing of an information charging that defendant LeRoy Garber failed on or about October 18, 1965, to require his fifteen year old daughter, Sharon Garber, then under his control, to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, in violation of K. S. A. 1965 Supp. 72-4801.

A jury was waived and the action was tried to the court on a written agreed statement of facts. Defendant was found guilty as charged. Subsequently he filed motions to amend the findings and judgment and for a new trial which were all overruled, and defendant was sentenced to pay a fine of $5.00 and costs. His appeal to this court from that sentence presents two questions: First, whether under the facts he is guilty of any offense and, second, whether as applied to him our compulsory school attendance law violates his constitutionally guaranteed religious freedom.

The stipulation of the parties reveals the following pertinent facts: Defendant LeRoy Garber is a member of the Old Order Amish Mennonite Church. He is the father of Sharon Garber, who was born September 18, 1950, and who is under his control. Sharon completed the eighth grade in the public schools, finishing at Elreka, Reno County, Kansas, in May of 1964; since that time she has not been enrolled as a student at any public school in Reno County, Kansas. Her home school district is the Partridge

Rural High School District in Reno County which commenced its 1965-1966 school year on August 25, 1965, to run for 180 days. In September of 1964 Sharon enrolled as a high school student in a correspondence school in Chicago, Illinois, known as the American school, and at all times applicable herein she has continued to take certain correspondence courses contained in what is known as a vocational cultural plan and has made high grades. This school is approved by the United States Office of Education for private home study under certain laws whereby tuition may be paid by the federal government. On September 3, 1965, following the passage by the 1965 legislature of our present law requiring school attendance up to age sixteen, a group of Amish people in the Yoder community in Reno County, Kansas, established a school for their children known as the Harmony school. This school was organized pursuant to a written plan in accordance with the Amish religious faith and way of life. Its pupils are limited to those who have completed the eighth grade in public schools but have not attained the age of sixteen. It is taught by an Amish farmer whose formal education has consisted of eight grades in the public schools. Formal classes are held in the Harmony school one morning each week. On each of the remaining four school days students spend at home one hour in study and five hours in pursuit of vocational training upon which a written report is submitted to the instructor. All instruction is given in the English language except in a German reading course in which the German bible is used. Emphasis is placed on the vocational home training consisting generally of farming projects for boys and home economics and home management for girls. On October 5, 1965, defendant was served with a statutory notice of truancy (K. S. A. 72-4802) of his

daughter Sharon. Thereafter and on October 15, 1965, Sharon enrolled in the Harmony school and was so enrolled on October 18, 1965.

The agreed statement of facts also contains a history of the Amish people and a recital of their religious tenets and practices. Their religion stems from a seventeenth century branch of the Mennonite Church and they adhere strictly to the beliefs, customs and traditions embraced by their forefathers. Extremely conservative, they are a quiet, industrious, plain people who cherish three great values: A devout religion, an agrarian way of life, and a cohesive family and community. These values are deeply rooted in their educational views as in all aspects of their life. A cardinal tenet in the Amish faith is the Biblical injunction, "Be not conformed to this world", adherence to which, under their rigid interpretation, has doubtless contributed to their survival as a cultural group. Opposition to public secondary schools derives from their feeling that eventually this exposure of their children to that secular influence will erode the Amish way of life.

The first question posed is whether the facts support the finding of guilt of the defendant. Our compulsory school attendance statute is K. S. A. 1965 Supp. 72-4801 which provides in pertinent part:

> "That every parent, guardian or other person in the state of Kansas, having control over or charge of any child who has reached the age of seven years and is under the age of sixteen years, shall require such child to attend continuously a public school or a private, denominational or parochial school taught by a competent instructor, in which all instruction shall be given in the English language only, each school year, for

such period as the public school of the district in which the child resides is in session.

"Any child who is physically or mentally incapacitated for the work of the common schools is exempt from the provisions of this act. . . . If such child is found capable of doing the work of the common or high schools, as the case may be, the child shall not be exempt from the provisions of this act, except as specifically provided herein. A child attending secondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents or the guardian of such child is filed with the proper authorities of the school attended, requesting that the child not be required to participate in such activity and stating the reason for such request."

Noteworthy is the fact the act provides exemption only on the basis of physical or mental incapacity. K. S. A. 72-4802 complements the foregoing by prescribing an enforcement procedure, including service of truancy notice, and penalty for violation.

Defendant contends Sharon's enrollment in both the American school and the Harmony school satisfied the statute.

We have had compulsory school attendance laws in Kansas since 1874. Numerous amendments throughout the years reflect our transition from the frontier era. These changes have been in the number and nature of exemptions granted, the minimum and maximum ages of the children affected, and the length of time prescribed for school attendance. The last amendment and the one precipitating

this lawsuit was the elimination in 1965 of the proviso that the act should not apply to any child who has completed the eighth grade. One of the earlier changes is particularly significant for our purposes here. Prior to 1903 our truancy act provided, as an acceptable excuse for not requiring one's children to attend a public school,

> "... that such child or children are taught at home in such branches as are usually taught in the public schools, subject to the same examination as other pupils of the district or city in which the child resides...." (G. S. 1901, Par. 6420.)

The act was amended in 1903 by the elimination of the home study exemption. This court dealt with the effect of the amendment in *State* v. *Will*, 99 Kan. 167, 160 Pac. 1025, stating:

> "In the later act, which obviously was for the purpose of improving the truancy law and providing means for its enforcement through truancy officers, the significant language of the earlier act concerning the course of study imposed on home-taught pupils is left out. There must have been a reason for that. The act of 1903 (Laws 1903, ch. 423, Gen. Stat. 1909, Par. 7736 *et seq.*) enlarges as to the kind of schools which a child may attend to excuse him from public school attendance. They may be either 'private, denominational or parochial,' but nothing is said as to the course of study in such schools. These schools must be taught 'by a competent instructor, each school year, for such period as said school is in session.' May we not assume that the legislature knew what it was about when it provided in the earlier act that if the child were taught

> at home it must be in the common-school branches and that the child should be subject to examination as other district and city pupils might be. This provision would serve a useful and almost necessary purpose to prevent a mere pretense of home instruction to avoid the consequences of the truancy law. In the later act, it will be observed that home instruction is no longer an excuse for nonattendance in school, but the number and kind of schools to which he may be sent are enlarged. They may be either private, denominational or parochial." (p. 170.)

In *State* v. *Lowry*, 191 Kan. 701, 383 P. 2d 962, this court applied the reasoning expressed in *Will* and refused to approve what amounted to scheduled home instruction as an excuse for nonattendance in schools prescribed in the truancy act.

Thus we see neither the American nor the Harmony school, being essentially home instruction systems, constitutes a private, denominational or parochial school within the meaning of our truancy act. Even if, as contended by defendant, the instruction given through them could be considered as instruction equivalent to that given in a public, private, denominational or parochial school, this would not be an excuse for nonattendance at the latter for the reason that the legislature has made no provision for such equivalent instruction as the basis for exemption. The only exemption now enumerated in our truancy law as being acceptable for not sending a child to one of the named schools being for physical or mental disability of the child, this is, in view of the legislative history of the statute, deemed exhaustive of such exemptions.

It should be noted moreover that our law requires that the child "attend *continuously . . . for such period as the public school of the district in which the child resides is in session.*" (Our emphasis.) K. S. A. 72-1106 provides:

> "A school month shall consist of four (4) weeks of five (5) days each of six (6) hours per day on which pupils of a school are under direct supervision of its teacher or teachers while they are engaged together in educational activities. . . ."

From our examination of this statute we conclude it is one of general application and is to be considered in connection with the compulsory attendance law in determining the requisite period of attendance. Sharon did not attend any school wherein the school month consisted of four weeks of five days each of six hours per day during which pupils were under direct supervision of a teacher. Hence she did not continuously attend any school acceptable under our statute during the time the Partridge Rural High School was in session from August 25, 1965, through October 18, 1965. Therefore, her father, no matter how sincere or well intentioned, must be deemed guilty of violating the statute.

Defendant makes no general attack upon our compulsory school attendance law and indeed the validity of such laws has generally been recognized, for the natural rights of a parent to the custody and control of his child are subordinate to the police power of the state and may be restricted and regulated by municipal law providing minimum educational standards (79 C. J. S., Schools and School Districts, Par. 463 b.; 47 Am. Jur., Schools, Par. 156). The promotion of education is a legitimate function of the state,

and in Kansas is one particularly imposed on the legislature by article 6, section 2 of the constitution (see, *State, ex rel.*, v. *Kemp*, 124 Kan. 716, 261 Pac. 556). Defendant does challenge the application of the law to him by asserting it infringes upon his religious freedom guaranteed by our state and federal constitutions. The bill of rights of our state constitution, section 7, provides:

> "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. . . ."

The first amendment of the federal constitution provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ,"

and the fourteenth amendment thereof provides:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

There is no contention here that the statute is unconstitutional because Sharon is compelled by law to go only to a secondary public school. That statute does not so require and would be invalid if it did although it is recognized the state can require that all children of proper age attend some school (*Pierce* v. *Society of Sister*, 268 U. S. 510, 69 L. ed. 1070, 45 S. Ct. 571, 39 A. L. R. 468). Parents do have

the right to educate their children elsewhere than in the public schools, provided the state's minimum educational requirements are met (*Zorach* v. *Clauson*, 303 N. Y. 161, 100 N. E. 2d 463, affirmed in 343 U. S. 306, 96 L. ed. 954, 72 S. Ct. 679).

In accommodating between the competing right of the state to compel action in the public welfare and the right of the individual to his constitutional religious freedom the courts have distinguished between religious beliefs and religious practices. Failure to comply with reasonable requirements in the exercise of the police power for the general welfare has never been condoned in the name of religious freedom. As stated in *Commonwealth* v. *Beiler, Appellant*, 168 Pa. Super. 462, 79 A. 2d 134, 137,

> "Religious liberty includes the absolute right to believe but only a limited right to act." (p. 468.)

These general principles have been invoked many times. Examples of distinctions made between belief and practice are concisely set forth in Beiler, supra, as follows:

> "A Mormon believed that plural marriage were divinely ordained but when he acted upon his belief he was convicted of polygamy. *Reynolds* v. *U. S.*, 98 U. S. 145, 25 L. Ed. 244. A Jew held his Sabbath a holy day but when he refused to be judicially sworn on Saturday he was fined. *Stansbury* v. *Marks*, 2 Dallas 213. A Seventh Day Baptist believed he should rest from his labors on Saturday and follow the divine command, 'six days shalt thou labor', but when he worked on Sunday he was convicted under the Act of 1794, *Specht* v. *Com.*, 8 Pa. 312. A Mennonite maid believed she should wear the distinctive garb of her

Church at all times, but she was not allowed to wear it in the school where she taught. *Com.* v. *Herr,* 39 Pa. Superior Ct. 454, affirmed 229 Pa. 132, 78 A. 68. Methodist students, who believed that 'participation in war is a denial of their supreme allegiance to Jesus Christ', were nevertheless required to receive military training at a state university. *Hamilton* v. *Regents,* 293 U. S. 245, 55 S. Ct. 197. A Jehovah Witness sent her minor child 'to preach the gospel' by selling religious pamphlets on the public highways and was convicted of a violation of a child labor law. *Prince* v. *Massachusetts,* 321 U. S. 158, 64 S. Ct. 438. An imposing list of similar cases might be easily compiled. In total they apply the principle which Gibson forcibly expressed in his memorable dissent in *Com.* v. *Lesher,* 17 S. & R. 155, 160: 'It is declared in the constitution [of 1790] . . . that "no human authority can, in any case, control or interfere with the *rights of* conscience." But what are those rights? Simply a right to worship the Supreme Being according to the dictates of the heart; to adopt any creed or hold any opinion whatever on the subject of religion; and to do, or forbear to do, any act, for conscience sake, the doing or forbearing of which, *is not prejudicial to the public weal.* But *salus populi suprema lex,* is a maximum of universal application; and where liberty of conscience would impinge on the paramount right of the public, it ought to be restrained.' (Gibson's italics.)" (pp. 468, 469.)

In *Prince* v. *Massachusetts,* 321 U. S. 158, 88 L. ed. 645, 64 S. Ct. 438, mentioned in *Beiler* above, the parent as a member of Jehovah's Witnesses claimed the right "to

bring up the child in the way he should go [and] to teach him the tenets and practices of our faith." (p. 164.) In commenting on the parental claim the court said:

> "But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. *Reynolds* v. *United States*, 98 U. S. 145; *Davis* v. *Beason*, 133 U. S. 333. And neither rights of religion nor right of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways [citing cases]." (p. 166.)

Applying the foregoing, we are unable to perceive from the record before us how religious freedom is abridged in this case. There is no infringement upon the right to worship or to believe insofar as either defendant or his daughter is concerned. Their freedoms to worship and to believe remain absolute and are not affected by our compulsory school attendance law. Defendant may instruct his daughter in religious beliefs as he desires. It can scarcely be doubted that defendant is sincere when he says his religious convictions are violated if his daughter receives a secular type of education found in the secondary public schools, but it is apparent he does not object to secular education *per se* since his daughter has attended the elementary public schools eight years. We are not called upon to attempt to prescribe any permissible degree of secularity in education beyond which religious freedom is infringed. The question of how long a child should attend school is not a religious one. No matter how sincere he may be the individual cannot be permitted upon religious grounds to be

the judge of his duty to obey laws enacted in the public interest (*Rice* v. *Commonwealth*, 188 Va. 224; 49 S. E. 2d 342, 3 A.L.R. 2d 1392). We think the particular law at issue here is valid as applied to defendant and his daughter and does not infringe upon constitutionally guaranteed religious freedom.

For other decisions in harmony with the position taken herein on this question, see the following: *Com. ex rel. Sch. Dist. of PGH.* v. *Bey et ux.*, 166 Pa. Super. 136, 70 A. 2d 693; *Commonwealth* v. *Smoker, Appellant*, 177 Pa. Super. 435, 110 A. 2d 740; *State ex rel. Shoreline etc.* v. *Sup. Ct.*, 55 Wash 2d 177, 346 P. 2d 999, cert. den., 363 U. S. 814, 4 L. ed. 2d 1154, 80 S. Ct. 1248; *Shapiro* v. *Dorin*, 199 Misc. 643, 99 N. Y. S. 2d 830, affirmed without opinion, 278 App. Div. 705, 103 N. Y. S. 2d 757, affirmed without opinion, 302 N. Y. 857, 858, 100 N. E. 2d 48; *In Re Currence*, 42 Misc. 2d 418, 248 N. Y. S. 2d 251; *Cude* v. *State*, 237 Ark. 927, 377 S. W. 2d 816; *Mosier* v. *Barren County Board of Health*, 308 Ky. 829, 215 S. W. 2d 967; *Commonwealth* v. *Renfrew*, 332 Mass. 492, 126 N. E. 2d 109; *State* v. *Hershberger*, 103 Ohio App. 188, 144 N. E. 2d 693.

The judgment is affirmed.

APPROVED BY THE COURT.

## Opinion of the District Court of Reno County, Kansas

Filed, January 10, 1966

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

Case CR 7679

MEMORANDUM OPINION

This matter comes before the court for decision upon stipulated facts, a jury trial being expressly waived by the Defendant in writing.

*Citations:*

Section 7, Bill of Particulars, Kansas Constitution states: "The right to worship God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend or support any form of worship; nor shall any control of or interference with the rights of conscience be permitted, nor any preference be given by law to any religious establishment or mode of worship. No religious test or property qualification shall be required for any office of public trust, nor for any vote at any election, nor shall any person be incompetent to testify on account of religious belief".

Chapter 409, 1965 Session Laws of Kansas, in substance, requires every parent, having control of any child who has reached the age of seven years and is under the age of sixteen years, to have such child attend continuously a public school or a private, denomination or parochial

school taught by a competent instructor in the English language for such period as the public school of the district in which the child resides is in session. Any child attending secondary schools in this state shall not be required to participate in any activity which is contrary to the religious teachings of such child, if a written statement signed by one of the parents of such child is filed with the proper school authorities requesting that the child not be required to participate in such activity and stating the reason for such request.

K.S.A. 72-4802 provides, in substance, that any parent of such child between seven and sixteen years delinquent in school attendance may be adjudged guilty of a misdemeanor and fined in a sum not less than $5 nor more than $25, and be committed to the county jail until same is paid.

K.S.A. 72-1103, in substance, provides that all schools, public, private or parochial, shall provide and give a complete course of instruction to all pupils, in civil government, and U.S. history, and in patriotism and the duties of a citizen, suitable to the elementary grades; in addition thereto, all high schools, public, private or parochial, shall give a course of instruction concerning the government and institutions of the United States, and particularly of the U. S. Constitution; and no student shall be graduated from such school who has not taken and satisfactorily passed such course.

K.S.A. 72-1106 provides, in substance, that a school month shall consist of four weeks of five days each of six hours per day on which pupils of a school are under direct supervision of its teacher or teachers while they are engaged together in educational activities.

Where the property rights of members of a church are not involved, our courts will not investigate or determine its faith or doctrine. The courts accept as true definitions of faith, the expressions and interpretations of ecclesiastical officers, governing church councils and judicatories which the church has authorized to speak for it. (3 Pa 282; 20 L.Ed 666; 41 Pa 9; 29 LRA 476).

In State v Lowry, 191 Kan 701, our Kansas Supreme Court, pointed out that Home Instruction was proper in Kansas at one time but subsequently the legislature deleted the home instruction proviso as a reason for not attending school. The present truancy act still omits the home instruction proviso. Following the decision in State v Will, 99 Kan 167, the legislature provided for the minimum course requirements of study to be taught in all schools (Laws 1919, Ch. 257, #2, the pertinent part of which is now K.S.A. 72-1103). In 191 Kan 701 the Court also held that in order to be classed as a private school, any school in Kansas must at least meet the course of instruction requirements of 72-1103, and the students must be taught by a competent instructor in the English language for the prescribed time as provided by K.S.A. 72-4801.

In Commonwealth v Beiler, (Pa) 79 A 2d 134, the defendants, members of the Amish sect, were convicted in lower court of violating the compulsory school attendance laws. Their children, age 14 years, had completed the 8th grade in public schools and were eligible for instruction in a highschool. The defendants refused to send said children to a secondary school, private, denominational or public, contending that such would be contrary to their religious beliefs. On appeal, the supreme court held: (a) parents have no constitutional right to deprive their chil-

dren of an education or prevent the state from assuring children adequate preparation for independent, intelligent exercise of their privileges and obligations as citizens of a free democracy, (b) that the state does not interfere with religious liberty by reasonably restricting parental control of minor children or compelling parents to perform their natural and civic obligations to educate their children within age limits and in subjects prescribed by law, whether in public, private or denominational schools or by approved tutors, (c) that the rights of conscience which the constitution declares that no human authority can control or interfere with, are simply rights to worship a Supreme Being according to dictates of the heart, adopt any creed or hold any opinion on the subject of religion, and do or forbear from doing, for conscience's sake, any act the doing or forbearing of which is not prejudicial to public weal, but liberty of conscience should be restrained where it would impinge on paramount rights of the public, and (d) that the State, as parens patriae, may restrict parents' control of their minor children by requiring school attendance thereby, though parents base their claim to control the children's course of conduct on religion or conscience. (see also Minersville School District v Gobitis, 60 S Ct 1010).

In People v Dorin, 99 NYS 2d 830, a Jewish sect's belief that systematic secular education was prohibited by Jewish law, resulting in members sending children to religious school which was not recognized by Jewish Education Committee for parochial schools, and which failed to meet state standards, was held no defense to a charge of violation of the New York compulsory education laws.

In Shoreline School District v Superior Court (Wash), 346 P2d 999, withdrawal of a 4th grade child from school

was not warranted by religious belief of parents forbidding presence where meat, fish, or fowl was served, or music played, and giving of instructions to child by its mother, who was a high school graduate, was insufficient to comply with education law.

In People v Turner, 263 P2d 685, it was held that a parent or private tutor instructing at home was not comprehended by statute exempting children from attending public schools if they attended private fulltime day school.

And in Re Shinn, 16 Cal Rptr 165, it was held children were not attending private school so as to be exempt from attending public school where the children were enrolled in a correspondence school, the parents who acted as tutors did not have valid state credentials for grades taught, and the children did not receive instruction in civics or California history.

In Ohio where statutes require children between certain ages to attend recognized public, private or parochial schools (with limited exceptions), if such children are sent to private schools, said private schools must provide instruction equivalent to free instruction furnished in public schools, and parents of children attending a private school in which the instruction given is not equivalent to instruction given in public schools to children of like ages and advancement, are guilty of violation of the state compulsory education law (State v Hershberger, 144 NE 2d 693).

In Re the Matter of Ronald Currence, 248 NYS 2d 251, the mother of a child of compulsory school age kept her child from public school on Wednesday afternoons through Thursday mornings for the purpose of religious observance and training. The mother and child were members of a religious sect known as the Ancient Divine Order of Melchiasadech, and it is one of their religious beliefs

that the Sabbath begins at noon on Wednesday of each week and ends at noon the following day. In this case the court held (a) while the state may not interfere with the religious beliefs of a person, it may, however, prohibit such acts or practices as are detrimental to the general welfare of the community, (b) that the freedom to believe as one chooses in the matter of religion is absolute, but the freedom to act in the exercise of religion is subject to regulation in the public interest and for the good order of society, and (c) that it was not a defense that a child may be withdrawn from school for observation of his Sabbath and religious instruction.

In 49 SE 2d 342 it was held the fact that parents' refusal to send their child to school was without intent to commit a crime did not preclude the enforcement of the penalty prescribed by the compulsory education law.

In Commonwealth v Bey (Pa), 70 A2d 693, the defendants were Mohammedans who refused to send their children of compulsory school age to school on Fridays, the sacred day of that religion, but did so on other school days. In this case the court held: (a) parents have no constitutional rights to deprive their children of blessings of education or prevent the state from assuring children adequate preparation for independent and intelligent exercise of their privileges and obligations as citizens of a free democracy, (b) the Pennsylvania statute requiring every parent of any child of compulsory school age to send such child to a day school and requiring that such child attend that school continuously through the entire term and providing that the requirement of compulsory attendance can be satisfied in day school, public school, private school or institution for the education of children does not interfere with or impinge on religious freedom

of parents or guarantees of either federal or state constitutions, and (c) where parents exercised option provided by statute and elected to send their children to public schools, they were bound to perform all requirements of compulsory attendance provisions and could not send their children to public schools on condition they would be excused on Fridays because of religious beliefs, and such parents had no constitutional right to submit only to a part of a statute. (see also Prince v Massachusetts, 64 S Ct 438; Commonwealth v Smoker, 110 A 2d 740).

In State v Vaughn, 207 A2d 537 (NJ) it was held the State's complaint need only to allege that the defendant as parent of the child did not cause said child regularly to attend the public school of the district in violation of the particular state law. It was then held incumbent upon the defendant, if he should rely upon exceptions, to introduce evidence to show attendance at day school in which there is given instruction equivalent to that provided in public schools, etc. unless of course, such appears from the state's case. Ultimate burden of persuasion remains with the State.

*Findings of Fact:*

The facts are as stipulated between the parties, said written stipulations and supplemental stipulations being made a part of this memorandum opinion by reference.

*Conclusions of Law:*

A. That the defendant has not complied with Kansas Compulsory school attendance laws. To illustrate:

1. Chapter 409, 1965 Session Laws of Kansas, requires a child of compulsory school attendance age, not attend-

ing public school, to attend *continuously* a private or parochial school *for such period as the public school of the district in which the child resides is in session.* And to comply with K.S.A. 72-1106 such child must attend a private or parochial school having a school month consisting of four weeks of five days each of six hours per day during which pupils are under *direct* supervision of its teacher while they are engaged *together* in educational activities.

a. Sharon Garber attends formal classes at Harmony School, under direct supervision of its teacher Amos Bontrager, during just one morning each week. During each of the 4 remaining days in the week Sharon, at home and on the job, spends one hour at study on courses taught at the Harmony School and five more hours each day in pursuit of vocational education and correspondence courses with a regular written report of such activities submitted to the regular teacher weekly. Sharon does not attend continuously a private school for such period as Partridge Rural High School is in session, nor during the statutory school month is she engaged together with other pupils in educational activities under the direct supervision of the Harmony school teacher.

2. Harmony school does not qualify with Kansas statutes so as to be a private or parochial school within the meaning of our compulsory school attendance laws. Again, to illustrate:

a. Pupils are engaged together in educational activities under the direct supervision of the teacher at Harmony school only one morning each week. This does not comply

with K. S. A. 72-1106, and Chapter 409, 1965 Sessions Laws of Kansas.

b. During actual sessions of Harmony school complete courses of instruction in the particulars set forth in K.S.A. 72-1103 are not given. Neither does this court feel Amos Bontrager is a competent teacher to teach same (see Kansas State Department of Public Instruction Subject & Field Requirements for Secondary Teachers, April 1961).

3. Correspondence and vocational courses given Sharon at her home and on the job, in effect, constitute "Home Instruction". Home instruction was once permitted in Kansas (see G. S. Kansas 1901, #5420) but later abolished (see G.S. Kansas 1906, #7736), and our current compulsory school attendance laws still omit the "home instruction" proviso. In this respect, K. S. A. 72-1106 and Chapter 409, 1965 Session Laws of Kansas are not complied with (see 191 Kan 701).

B. The defendant's religious beliefs are not a defense to failure to comply with the Kansas compulsory school attendance laws.

1. Parents have no constitutional right to deprive their children of an education or prevent the state from assuring children adequate preparation for independent, intelligent exercise of their privileges and obligations as citizens of a free democracy. The safety, integrity, independence, progress, and even the life, of our state and nation depend upon the enlightened intelligence of its citizens. And unless democracy lives, religious liberty cannot survive.

2. The freedom to believe as one chooses in the matter of religion is absolute, but the freedom to act in the exercise of religion is subject to reasonable regulation in the public interest and for the good order of society. The rights of conscience which the constitution declares that no human authority can control or interfere with are simply rights to worship a Supreme Being according to the dictates of one's heart, adopt any creed or hold any opinion on the subject of religion, and do or forbear from doing, for conscience's sake, any act the doing or forbearing of which is not prejudicial to the public weal, but liberty of conscience should be restrained where it would impinge on the paramount rights of the public.

3. The state does not interfere with religious liberty by reasonably restricting parental control of minor children or compelling parents to perform their natural and civic obligations to educate their children within the age limits and in subjects prescribed by Kansas Law, whether in public, private or denominational school. The State, as parens patriae, may restrict a parent's control over his minor child by requiring school attendance although the parent bases his claim to control the child's course of conduct on religion or conscience. Query: If the law could compel no parent to give his child more than an 8th grade education, then how long would it be before our better educated enemies would destroy this nation, including its Amish members?

*Decision of the Court:*

This court finds the defendant, LeRoy Garber, guilty as charged by the State in its information filed herein.

The defendant will inform the court forthwith if he desires to file a motion for a new trial; and if not, will appear for sentence before this court on Friday, January 14, 1966 at 9:00 o'clock A.M. for imposition of sentence.

*Comments*:

In making its decision the court recognizes that the Amish in Kansas are a quiet, pious, law-abiding and industrious people whose vitalizing contributions to the development of the agricultural resources of the communities in which they live are substantial. However, our legislature has seen fit recently to increase the compulsory school attendance age to 16 years for all children, and this court has a solemn obligation to uphold its provisions.

However, and solely as an informal suggestion, couldn't the Amish without much trouble either (a) qualify Harmony school as a parochial secondary school under Kansas law and thereby keep their children together and away from public school influences, or (b) get the legislature to re-insert the former "Home Instruction" proviso in the present compulsory school attendance statutes?

The defendant was charged with violation of the Kansas compulsory attendance law "on *or about* October 18, 1965" but Sharon did not enroll in Harmony school until October 15, 1965 (see Exhibit D). According to paragraph 61(a) of the stipulated facts Partridge Rural High School commenced its current school year on August 25, 1965. Plainly there was a violation of the compulsory school attendance laws between August 25, 1965 and October 15, 1965.

To this court's knowledge the constitutionality of the provisions of the Kansas compulsory school attendance law

was not raised as an issue by the parties, and thus same is not herein determined by the court.

An appropriate journal entry will be appreciated.

Dated January 10, 1966.

JAMES H. REXROAD
District Judge, Division II

## Opinion of the District Court of Reno County, Kansas

Filed, January 24, 1966

IN THE DISTRICT COURT OF RENO COUNTY, KANSAS

Case No. CR 7679

146-175

MEMORANDUM OPINION

This matter comes before the court upon the motion of the defendant, LeRoy Garber, for a new trial. Arguments are presented by counsel.

The motion for a new trial, information, stipulated facts, exhibits and the court's memorandum opinion (decision), dated January 10, 1966, are included herein by reference.

The defendant's objections are discussed as follows, and in the order listed in his motion for a new trial.

1. The defendant states that the information filed herein charges the defendant with "wilfully" failing to require Sharon to attend school, and that wilfulness was not shown.

a. The term "wilfully" means done purposely and intentionally, and not by accident or surprise. In view of the expressed Amish opposition to schooling beyond the 8th grade and the defendant's membership in that church group, as mentioned in the stipulated facts, this court cannot agree that the defendant's failure to comply with our compulsory school attendance law was not done purposely and intentionally, especially between August 25 and October 15, 1965, when Sharon did not attend any school at all.

b. KSA 62-1011 provides, in part, that no information may be quashed or set aside (a) for any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged, and (b) for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. Not only was no attack made upon the language used in the information until after this court's January 10th decision, but it is felt (1) since Chapter 409 does not specify that failure to have a child attend school must be a "wilful" failure that the use of the word "wilful" in the information filed in this case is mere surplusage, and (2) same does not prejudice the substantial rights of the defendant. Surplusage is not a ground for quashing an information where the crime and the person are properly charged (172 Kan 737).

c. Not only may a parent violate a compulsory school attendance law by *wilfully* refusing to do so, but if he *neglects* to perform such a civil obligation he may be coerced by the law to execute it (see 47 Am Jr., Schools, #156; 61 NE 730).

d. The fact that a parent's refusal to send his child to school was without an intent to commit a crime does not preclude enforcement of the penalty prescribed by the compulsory school attendance laws (Rice v. Commonwealth, 49 SE 2d 342).

2. If, as the defendant contends in his motion for a new trial, the Amish attempted in good faith to have Harmony School comply with Chapter 409 then certainly they must have read the provisions of said Chapter 409, especially that portion requiring a child attending a denominational school to attend continuously for such period as the public

school in that district was in session; and accordingly, Harmony school sessions would have been more than one morning per week (and shouldn't the Amish also have read KSA 72-1103 and 72-1106†). The fact still remains (a) that Harmony school per se does not comply with Kansas school law requirements, and (b) that between August 25 and October 15, when Partridge Rural High School was in session, Sharon did not attend school at all in violation of Chapter 409.

4. Not only do Kansas compulsory school attendance laws not permit the giving of equivalent instruction elsewhere than in a school (see 99 Kan 167; 14 ALR 2d 1369), such laws now require a child to attend school until 16 years of age regardless of whether or not her level of achievement equals or exceeds the average of a common school student; in fact, Chapter 409 expressly states, "If such child is found capable of doing the work of the common or high schools, as the case may be, the child shall not be exempt from the provisions of the act * * * ". Since Sharon completed the 8th grade, and does not qualify for any of the listed exemptions, she must continue in a secondary school, public, private or parochial, until the age of 16 years is reached.

5. Article 11, by its heading, is not limited solely to "common school" courses but pertains also to other "related provisions". (See also 113 ALR page 702, and 51 Kan 792 to the effect that the term "common school" includes "high school").

a. 72-1103, thereunder, specifically refers to "all schools, public, private or parochial", and in addition, refers in part to "all high schools, public, private or parochial".

b. KSA 72-1106 is in effect applicable to a denominational school; i.e. Chapter 409 requires a child to attend continuously a private or denominational school for such period as the public school of the district in which the child resides is in session; and such public school must comply with KSA 72-1106 and conduct school sessions for the prescribed period of time.

6. KSA 60-409 permits a court to take judicial notice, without request by a party, of the duly published regulations of governmental sub-divisions or agencies of this state (the court also reached outside the record in obtaining the legal citations set forth in its January 10th decision inasmuch as neither the state nor the defendant offered any in behalf of their respective contentions).

7. In State v. Gill, 63 Kan 382, the information charged that the offenses were committed in June whereas the evidence showed same to have occurred in May. The court held that "the stat. is not required to prove that an offense was committed on the particular day named in the information but may show that it was committed at any time within two years next preceding the filing of the information" (see also KSA 62-1006; 33 Kan 708; 110 Kan 131; 85 F2d 996). Thus the court may consider Sharon's absence from any school between August 25 and October 15, 1965 in determining the defendant's innocence or guilt of the offense charged, and is not limited to the exact date set forth in the information filed herein . . . and accordingly, the defendant can be found guilty as charged, even though Harmony school were a qualified private or parochial school, which it is not.

8. As stated in the memorandum opinion, dated January 10, 1966, the constitutionality of the provisions (language) of the Kansas compulsory school attendance law was not raised as an issue by the parties, and thus was not determined by the court.

However, the following is now submitted :

a. "Statutes making the education of children compulsory have become very general in the United States. Their constitutionality is beyond dispute, for the natural rights of a parent to the custody and control of his infant child are subordinate to the power of the state, and may be restricted and controlled by municipal law. One of the most important natural duties of a parent is the obligation to educate his child; this duty he owes not only to the child, but also to the commonwealth. Hence, if a parent neglects to perform such a civil obligation, or wilfully refuses to do so, he may be coerced by the law into executing it". (47 Am Jur Schools, #156).

b. Compulsory school attendance statutes have generally been regarded as valid where children may attend private or denominational schools instead of only public schools (79 CJS page 390).

c. With reference to the proviso about instruction given in the English language see 191 Kan 701, to wit; "Under the statutes applicable to the instant case, we are of the opinion that *any* school in order to be classed as a private school must at least meet the course of instruction requirements of 72-1103, and the children must be taught by a competent instructor *in the English language* for the prescribed period of time as required by 72-4801" (Chapter 409).

d. Paragraphs 2 & 3, Supplemental Stipulation, in substance, state classes and subjects at Harmony school are taught in the English language, except the German Bible (and which course is not a statutorily required one). The constitutionality of a part of a statute may be questioned only by one affected by the operation (179 Kan 638; 187 Kan 566). And ignoring the clause "all instruction shall be given in the English language only", Harmony school still does not qualify as a private or a denominational school under Kansas laws.

e. Chapter 409, in part, requires continuous attendance at school "in which all instruction shall be given in the English language only". Defendant now contends this particular clause or phrase conflicts with Meyer v. Nebraska, 67 L Ed 1042, but in said case the court carefully states, "The power of the state to compel attendance at some school and to make reasonable regulations for all schools, *including a requirement that they shall give instruction in English*, is *not* questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy". However, for the purposes of argument let us assume that such phrase is unconstitutional and invalid. It is still a fundamental principle that a statute may be constitutional in one part and unconstitutional in another, and that if the invalid part is severable from the rest, the portion which is constitutional may stand while that which is unconstitutional is stricken out and rejected. Indeed, it has been said that whenever a statute contains objectionable provisions separable from those found to be unconstitutional, it is the duty of the court to so declare and to maintain the act insofar as it is valid (16 Am Jur. 2d, Con-

stitutional Law, #181). Thus, it is held that if after eliminating the invalid portions, the remaining provisions are operative and sufficient to accomplish their proper purpose it does not necessarily follow that the whole act is void, and effect may be given to the remaining portions (16 Am Jur. 2d, Constitutional Law, #182; 186; 140 Kan 744). It is also the duty of courts even though the legislature may not have expressed its will to that effect, to sever the valid from the invalid provisions of a statute and preserve the former if they relate to a distinct purpose which is not dependent upon the invalid provisions (16 Am Jur., 2d, Constitutional Law, #188; 183 Kan 287). It is this court's opinion that even if we eliminate the phrase "in which all instruction shall be given in the English language only" the rest of our compulsory school attendance laws are operative and sufficient to accomplish the general purpose of our legislature; and accordingly, are constitutional and valid (see also Commonwealth v. Snyder, 15 Pa Dist 765).

f. Pierce v. Society of Sisters, 45 S Ct Reptr 571, pertains to a state law requiring children to attend public schools exclusively. Our Kansas compulsory education laws give parents an option of sending their children to private or denominational schools. State v. Peterman, Commonwealth v. Beiler, Wright v. State and People v. Levison are cited by the defendant as supporting his contention he is not guilty as Sharon is receiving at home, instruction equivalent to that she would receive in school. Commonwealth v. Beiler and Wright v. State involve statutes wherein equivalent instruction elsewhere than at school may be given. In 14 ALR 2d 1369, Kansas (99 Kan 167) is listed among those states rejecting the contention that instruction in the home is instruction in a private school.

After consideration of the matters raised at the hearing of the defendant's motion for a new trial, this court finds that said motion should be, and same is, herewith overruled and denied.

In compliance with KSA 62-1723, the defendant will appear before this court on Wednesday, January 26, 1966, at 4:00 p.m., for imposition of sentence. (See KSA 72-4802 for sentence terms).

Dated January 24, 1966.

/s/ James H. Rexroad
James H. Rexroad
Judge Division II
40th Judicial District of Kansas